

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p><b>SUNGARD RECOVERY SERVICES, INC.,</b></p> <p style="text-align:center"><b>Plaintiff,</b></p> <p style="text-align:center"><b>v.</b></p> <p><b>INTERNATIONAL BUSINESS MACHINES CORPORATION,</b></p> <p style="text-align:center"><b>Defendant.</b></p>	<p><b>CIVIL ACTION NO. 99-5254</b></p>
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**MEMORANDUM AND ORDER**

**Katz, S.J.**

**December 9, 1999**

Plaintiff SunGard Recovery Services alleges that defendant International Business Machine Corporation (IBM) tortiously interfered with SunGard's contract with a former customer, Key Services Corporation, now know as KeyCorp. Now before the court is IBM's motion to transfer the action to the Northern District of Ohio, pursuant to 28 U.S.C. § 1404(a).

**Discussion**

SunGard alleges that IBM interfered with SunGard's contract to provide disaster recovery services<sup>1</sup> to KeyCorp (Key), a New York corporation which has its headquarters in Cleveland, Ohio. SunGard alleges various acts by IBM, including assisting Key in finding a basis for terminating the SunGard contract. In 1998, SunGard brought a breach of contract action against Key in this court. That case settled.

A court may transfer an action, for the convenience of the parties and witnesses, and in the interests of justice, to any district where the action might have been brought. See 28 U.S.C.

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<sup>1</sup>Both IBM and SunGard provide this type of service, which allows a company to continue its computer operations in the event of an emergency that renders the company unable to use its computer facilities at a particular location.

§ 1404(a). Venue for this action would be proper in the Northern District of Ohio since a substantial part of the alleged tortious conduct by IBM took place in that district. See 28 U.S.C. § 1391(a). The issue before the court is whether transfer to that district is appropriate.

In ruling on a motion to transfer venue pursuant to 28 U.S.C. § 1404(a), “the plaintiff’s choice of venue should not be lightly disturbed.” Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995) (citations, punctuation omitted). A motion to transfer should not be granted if it will merely shift the inconvenience from the defendant to the plaintiff. See Dinterman v. Nationwide Mut. Ins. Co., 26 F. Supp.2d 744, 749-50 (E.D. Pa. 1998). The movant bears the burden of establishing the need to transfer. See Jumara, 55 F.3d at 879.

A court considers both private and public interests when deciding a motion to transfer for convenience. See Jumara 55 F.3d at 879. The private interests to be considered in deciding a motion to transfer venue include:

the plaintiff’s forum preference as manifested in the original choice; the defendant’s preference; whether the claim arose elsewhere; the convenience of the parties as indicated by their relative physical and financial condition; the convenience of the witnesses—but only to the extent that the witnesses may actually be unavailable for trial in in one of the fora; and the location of books and records (similarly limited to the extent that the files could not be produced in the alternative forum).

Id. (internal citations, punctuation omitted). The public interests to be considered include:

the enforceability of the judgment; practical considerations that could make the trial easy, expeditious or inexpensive; the relative administrative difficulty in the two fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases.

Id. at 879-80 (internal citations, punctuation omitted).

Several of the private interests weigh in favor of transferring the action to Ohio. Most

compelling is that crucial third party witnesses may be unavailable were the case to be tried here. Because the sole cause of action in this case is IBM's alleged interference with SunGard's contract with Key, the testimony of Key employees regarding the company's decision to terminate Key's contract with SunGard is at the heart of this case. Eight Key employees were identified by Key during discovery in the 1998 breach of contract case brought against it by SunGard as being "involved in the decision to make alternative arrangements for a disaster recovery services provider." See Def. Ex. E at 3-4 (Key's Answers and Objections to Plaintiff's First Set of Interrogatories). In SunGard's self-executing disclosure, it identified four of those Key employees as non-party individuals likely to have relevant information. See Def. Ex. B (Pl.'s self-executing disclosure). According to David Brock, an IBM executive based in Cleveland who is responsible for marketing the company's services to Key, of those eight individuals identified by Key, six still work in Cleveland for Key, one is deceased, and one now works in California for another company. See Def. Ex. G (Aff. of Brock). According to David Schmeltzer, who was the IBM executive responsible for the Key account during the time of the alleged tortious interference, one of the witnesses in Cleveland is the Key executive who initially invited IBM to provide pricing for its disaster recovery services and who was involved "on a day-to-day basis in the events purportedly described in [SunGard's] Complaint." Def. Ex. F (Aff. of Schmeltzer). Another current Key employee still located in Cleveland is the executive who was the company's Chief Administrative Officer during the alleged tortious interference and who was "the highest level Key employee with day-to-day involvement in the management of Key's business recovery services unit." Id.

Those Key witnesses whose decisions and actions are at the center of this case may be

unavailable in this jurisdiction since the Key employees are outside the subpoena power of this court, see Fed. R. Civ. P. 45(c), 45(e), and Key refused to commit to making them available to testify in this action in this district in response to an inquiry by IBM's counsel. See Def. Ex. H (Aff. of Robert N. Feltroon, counsel for IBM). Other than current or former Key employees, SunGard has only named one other potential witness who is not an employee of either party—its former Chief Executive Officer, who currently resides in Philadelphia. However, SunGard has not identified what information this potential witness would provide that is relevant to this case, nor indicated that he would not voluntarily testify in Ohio. Thus, this witness does not figure in the court's analysis, and consideration of the availability of the Key witnesses weighs strongly in favor of transferring the case. See Maaco Enterprises, Inc. v. Doerner, Civ. A. 96-7442, 1997 WL 197292, at \*5 (E.D. Pa. April 17, 1997) (transferring action to forum where operative facts took place and court had power to subpoena many relevant witnesses).

Transfer to Ohio is also favored since a substantial part of the alleged tortious conduct took place there. SunGard has identified two meetings in which it claims IBM interfered with its Key contract. See Compl. ¶¶ 21-22, 29-35. Both these meetings took place in Ohio. See Def. Ex. F. Schmeltzer and other IBM employees had numerous conversations and meetings with Key employees regarding IBM's provision of disaster recovery services to Key in Ohio. See id. While some of the alleged activity by IBM appear to have taken place outside Ohio, see e.g. Compl. ¶ 25 (alleged investigation by IBM regarding successful termination of SunGard contracts by other companies), ¶ 33 (alleged investigation by IBM regarding bases for Key to terminate its contract with SunGard), none of those activities are alleged to have taken place in the Eastern District of Pennsylvania. See Def. Ex. F. ¶ 4 (stating that none of the IBM employees

identified in the complaint were stationed in Pennsylvania during the time period covered by the complaint). Thus, consideration of the operative facts of the claim favors transfer.

While the plaintiff's choice of forum is normally accorded considerable deference, that choice is given less weight where, as here, none of the operative facts took place in this forum. See National Mortgage Network v. Home Equity Ctr., 683 F. Supp. 116, 119 (E.D. Pa. 1988).

On the other hand, the defendant has a strong preference for another district, arguing that testimony from Key employees is critical to its defense. See Def. Mem. at 13. In light of the strength of the defendant's preference for another forum, the plaintiff's choice does not preclude transfer to another district.

The remaining private factors are in equipoise. Both parties are large corporations with sufficient resources to litigate in either forum. The papers relevant to this action are located in either this district, New York, or Ohio, and the parties have not suggested that the out-of-state files could not be produced. While SunGard argues that many of the documents are located in this district, the location of records is a relevant consideration only if they could not be produced in the transferee forum. See Jumara, 55 F.3d at 879.

Consideration of the public factors does not dictate a preference for either district. For example, much of the tortious conduct allegedly took place in Ohio and some of the witnesses reside there. In contrast, while none of the alleged conduct took place in Pennsylvania, the plaintiff is a Pennsylvania corporation that suffered an economic injury here. Thus, both localities have an interest in deciding the controversy. The related 1998 breach of contract action that was before this court has settled, therefore transfer to the Northern District of Ohio will not result in duplicitous litigation or inconsistent results. Courts in this district appear to be slightly

less congested, with a median time from filing to civil trial of twelve months compared to eighteen months in Ohio. See Pl. Mem. at 16 n. 3. Finally, this matter concerns the common law tort of interference with a contract, and while the court does not decide the question of which state's law should govern, it notes that application of either law will be relatively straightforward. See Scheidt v. Klein, 956 F.2d 963, 965 (10th Cir. 1995) (noting that the “relative simplicity” of common law fraud and breach of contract issues neutralizes the consideration of the familiarity of judges with applicable state law). In short, none of the public factors weigh strongly for or against either venue.

### Conclusion

Crucial third party witnesses may be unavailable at trial were this action to proceed in this district. Moreover, many of the alleged tortious acts took place in Ohio, and none occurred in this district. While the court recognizes the plaintiff's interest in proceeding in the forum of its choice, an overall balancing of factors weigh in favor of transferring this action to the Northern District of Ohio.

An appropriate order follows.

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**ORDER**

**AND NOW**, this 9th day of December, upon consideration of Defendant's Motion to Transfer Venue, and the response thereto, it is hereby **ORDERED** that the Motion is **GRANTED**. The Clerk shall transfer the record in this case to the Northern District of Ohio.

**BY THE COURT:**

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**MARVIN KATZ, S.J.**